FILE COPY

Office - Supreme Court U. S.
MAR 21
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

APPENDIX TO BRIEF FOR RESPONDENT.

JOHN J. O'TOOLE,
City Attorney of Respondent;
DION R. HOLM,
Assistant City Attorney of Respondent;
ROBERT M. SEARLS,
Special Counsel of Respondent;
GARRET W. McENERNEY,
Counsel for Respondent.

BRENAN-WALSH PRINTING CO. SAN FRANCISCO

Index to Appendix

Page

Contract, July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company for the distribution of municipal electric energy. (U. S. Exhibit 6-R. 223; 76-90.) i

Contract provisions in re consignment xii

Interpretation of contracts Civil Code California xvi

Proceedings in Congress 1908-1911 whereunder San Francisco sought to obtain concessions from the Government in respect of Hetch Hetchy Valley and other public lands; the five bills introduced by Representative Raker in the 63rd Congress, 1st Session, 1913; the text of Section 6 in each of the five bills and proceedings in respect of and amendments to Section 6 of the last of the five bills which was the one which became the law xvii

Proceedings in Congress 1908-1911 xvii

63rd Congress 1st Session 1913 xviii

Section 6 in the five bills introduced by Mr. Raker xviii

(1) H.R 112, introduced April 7, 1913 xviii

(2) H.R 4319, introduced April 25, 1913 xix

(3) H.R. 6281, introduced June 23, 1913 xix

(4) H.R. 6914, introduced July 18, 1913 xix

(5) H.R. 7207, introduced August 1, 1913 xix

(6) Proceedings in respect of and amendments to Section 6 of the Bill H.R. 7207, which became The Raker Act xx

Provisions of The Raker Act imposing obligations upon the Municipality in the nature of a price paid for the grant xxi

The provisions of The Raker Act involving forfeiture or reverter, and the "Condition" or "Conditions" thereof, none of which involve forfeiture or reverter, but the enforcement of which is provided for in Section 9, subsection (u) xxiii

Proceedings in Congress to show that The Raker Act was not designed to grant water rights and that the necessary rights were already possessed by the Municipality xxvii

Page

Proceedings in Congress to show that The Raker Act was a grant by a proprietor and not by a sovereign..... xxix

California constitutional provisions respecting franchises.. xxxii

Opinion of Acting Solicitor Wright of the Interior Department, dated July 20, 1925, holding contract of July 1, 1925, one of agency and not one of sale (R. 359-366).. xxxiv

(This Opinion, first made public in the Opinion of Secretary Ickes of August 24, 1935 (R. 234:31-235:8) was received in evidence subject to a motion to strike and later stricken out (Assignment of Error No. 11, R. 535).)

In the Supreme Court of the United States

OCTOBER TERM 1939

No. 587

UNITED STATES OF AMERICA,
Petitioner,

vs.

CITY AND COUNTY OF SAN FRANCISCO,
a Municipal Corporation,
Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

APPENDIX TO BRIEF FOR RESPONDENT.

Appendix

Contract, July 1, 1925, between the City and County of San Francisco and the Pacific Gas and Electric Company for the distribution of municipal electric energy.

(U. S. Exhibit 6—R. 223; 76-90).

THIS AGREEMENT, Made and entered into this first day of July, 1925, by and between the Board of Public Works of the City and County of San Francisco, acting for and on behalf of the CITY AND COUNTY OF SAN FRANCISCO, a municipal corporation, hereinafter referred to as "City", under authority of the Board of Supervisors granted by Ordinance No. 6684 (New Series), the party of the first part, and PACIFIC GAS AND ELECTRIC COMPANY, a corporation, of San Francisco, California, hereinafter referred to as "Company", the party of the second part;

WITNESSETH:

WHEREAS, the City has now completed the construction of the Moccasin power plant as a part of the development of the Hetch Hetchy Project, which plant has a rated capacity of 70,000 kilowatts and is capable of producing approximately 460,000,000 kilowatt hours of electric energy annually, and has also completed the building of a transmission line to the vicinity of Newark in Alameda County of sufficient capacity to transmit and deliver to that point approximately 420,000,000 kilowatt hours after allowance for transmission losses; and

WHEREAS, the City has not yet constructed or acquired a transmission line from the point near Newark to the City limits, and has not yet constructed or acquired a distribution system for utilizing the power produced at Moccasin plant and delivering the same for general municipal uses and for sale to consumers of electric energy within the limits of the City and County; and

WHEREAS, pursuant to resolutions of its Board of Supervisors looking to the acquisition of a municipally owned, electric distribution system, the City has commenced and there is now pending before the Railroad Commission of the State of California, proceedings for the determination by the Commission of the compensation to be paid by the City for the local distribution systems and certain steam plants now owned and operated by the Pacific Gas and Electric Company and the Great Western Power Company of California, respectively, when the same shall be taken over by the City under eminent domain proceedings, or otherwise; and

WHEREAS, the City has not funds available at the present time with which to purchase or construct a distribution system of its own and it will be necessary to submit a proposition to the People to vote bonds to provide money for that purpose, before a distribution system can be purchased or constructed, and the City cannot well determine whether to purchase one or both of the local distribution systems, or to construct a distribution system of its own until the Railroad Commission determines the amount of compensation to be paid by the City for the taking of either or both of said local distribution systems under the proceeding now pending before the Commission; and

WHEREAS, the City intends to complete its power transmission line from Newark to San Francisco and to acquire or construct a distribution system of its own; and

WHEREAS, the said Moccasin Power Plant is now in condition to operate at its full capacity of 70,000 kilowatts and unless some temporary arrangement is made between the City and the Company for the distribution to consumers of the electric energy which can be produced at said plant during the period that must elapse before the City can acquire, own and operate a distribution system of its own, there will be a great waste of said potential energy and a great loss of potential revenue to the City and its taxpayers; and

WHEREAS, the statistical and financial records kept by the City or the Company show the following, viz.:

1. That the total capacity and possible annual output of energy from the Moccasin plant will not be sufficient to supply all municipal requirements and the demand of consumers in the City and County for electric power and energy although in hours and days of low energy requirement the capacity and output may be more than sufficient to supply said requirements and demands during said hours and days.

2. That the average transmission and distribution losses of energy from the Newark substation of the Company to the various consumers' meters in San Francisco is 24 per cent of all energy delivered into the system of the Company at Newark for transmission and distribution to consumers in San Francisco.

3. That 2.383 cents is the average revenue per kilowatt hour received from all classes of consumers of the Com-

pany in San Francisco under existing rates based on the experience of the Company for the year 1924.

NOW, THEREFORE, in consideration of the premises and the mutual covenants and conditions herein contained, the parties hereto mutually covenant and agree as follows:

FIRST: The City hereby employs the Company and the Company accepts employment as temporary distributor for and in behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines. The City agrees to so maintain its Moccasin plant that it will, whenever necessary to do so, carry load up to its full capacity of 70,000 kilowatts, subject to limitations of its forebay storage and to accidents and unforeseen contingencies; and to deliver and consign the entire energy output of its said plant to the Company, save and except such portion thereof as may be reserved for City requirements as hereinafter provided. The Company agrees to accept such consignment of the entire energy output of Moccasin plant, less transmission losses and except such portion as the City shall retain as above and hereinafter mentioned delivered at not to exceed a 75 per cent monthly load factor, to make at its own expense the necessary physical connection of the City's transmission lines with its own system at Newark; to instal all necessary equipment, facilities and proper meters for accurately measuring the amount of energy delivered; to transmit so much of said energy through its own system to San Francisco as may be required to light public streets and to meet other municipal needs for electric energy; to supply street railroads and other consumers of such energy in the City; to trans-

form, convert, regulate, distribute and meter the energy sold; to furnish all necessary peak load and steam standby service and collect from consumers of such energy the charges therefor which shall not exceed the lawfully established rates, and make accounting to the City as hereinafter in Paragraph Fifth provided.

SECOND: The City agrees that the energy consigned to the Company from the Moccasin Plant shall be the entire output thereof, diminished only by transmission and other losses and by such amounts as the City shall require for its own use in the construction or operation of any portion of the Hetch Hetchy Project, and also by such amounts, if any, as the City may be legally required to furnish to irrigation districts or municipalities under the terms of the act of Congress, approved December 19, 1913, known as the Raker Act. Failure or inability of the Company to take at Newark a part of the energy which the City is in a position to deliver to it under the terms of this agreement shall not constitute grounds for deduction in the amount of the revenue to be paid to the City had such energy been received by the Company and sold to consumers, it being understood, however, that the Company is not required to accept the output of the Moccasin plant at a monthly load factor in excess of 75 per cent.

THIRD: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that of the energy consigned and delivered to the Company

at Newark and by the Company delivered to consumers in the City and County of San Francisco there would be transmission, substation and distribution losses amounting to 24 per cent of the energy thus consigned and delivered at Newark and therefore 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers.

FOURTH: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that inasmuch as in the year 1924 under existing rates the average revenue received by the Company from consumers in San Francisco amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy to be consigned and delivered by the City to the Company at Newark for the purposes in this contract declared.

FIFTH: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned and delivered by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that the City shall receive for the energy consigned and delivered by it to the Company at Newark 26.935 per cent of 2.383 cents per kilowatt hour for 76

per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof.

It is agreed by the City and the Company that the Company shall account for and pay over to the City for the energy so consigned and delivered to it by the City of Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered by the City to it at Newark, and the Company shall retain the aforementioned 73.065 per cent as its compensation for services rendered under this contract.

SIXTH: The City shall not be obliged to deliver energy into the system of the Company at Newark, nor shall the Company be obligated to receive such energy at such time as either shall be prevented from doing so on account of accidents, acts of God or fire, making it physically impossible to so deliver or receive energy or on account of strikes, riots, war, or any other cause beyond reasonable power of control of either party. In the event of inability on the part of the City to deliver the said energy at Newark, or inability on the part of the Company to receive the energy at Newark, arising from any of the causes in this paragraph specified, the party so prevented from making such delivery of energy or receiving such energy shall proceed at all possible speed to take the necessary action to enable it to comply with its covenants herein contained.

SEVENTH: The net proceeds due the City, namely 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent

of the energy so consigned and delivered at Newark by it to the Company, shall be paid into the Treasury of the City and County of San Francisco by the Company in monthly installments and not later than the 15th day of each month after operation under this agreement commences. The amount of such payment shall be based upon the amount of energy actually delivered into the system of the Company at Newark during the preceding month. In the event of the refusal, failure or inability of the Company to take the available output of the Moccasin plant deliverable at Newark in accordance with the terms of this agreement, then the amount of energy which the City could have delivered shall be the basis of computing such monthly payment. The method for determining this amount shall be covered in the memorandum of technical specifications, details and conditions hereinafter provided for.

EIGHTH: Should the present established rates for the sale of electric energy in San Francisco be hereafter increased or decreased by lawful authority, then the amount to be retained by the Company and the amount to be paid to the City under the terms of this agreement shall be proportionately increased or decreased.

NINTH: Neither this contract nor anything contained herein, nor the prices, rates or charges fixed herein, shall ever be offered or in any manner used as evidence by either said City and County or said Company or any successor in interest of either of them in any court or before any commission or official of the State of California or of the United States of America in any action or proceeding in which said City or any successor in interest shall be a

party adversary to said Company, or any successor in interest, other than an action or proceeding between the parties hereto, or their respective successors in interest, or one of said parties and a successor in interest of the other, commenced and prosecuted for the purpose of obtaining a judicial or official interpretation or determination of the legality of this contract or of any provision thereof or for the purpose of enforcing its performance, or recovering damages for its non-performance.

TENTH: It is expressly recognized that this contract is a temporary arrangement between the parties for distributing the energy output of the Moccasin plant over and through the Company's lines and system during the period that must elapse before the City can construct or acquire a distribution system of its own.

It is therefore agreed that the contract may be terminated at any time by either the City or the Company upon one day's previous notice in writing to the other.

ELEVENTH: It is further understood and agreed that this contract is subject to immediate cancellation upon request or demand of the Secretary of the Interior of the United States should he hold that in his opinion the agreement violates any provisions of the laws of the United States in general, or the Raker Act in particular.

TWELFTH: All of the electric energy to be delivered and received pursuant to the provisions of this contract shall be three phase, 60 cycle, alternating current. The electromotive force of such energy at the point of delivery shall be approximately 105,000 volts, slight variation in voltage and frequency to be permitted.

THIRTEENTH: The Company shall inspect, test and keep in proper repair all meters and accessories at Newark which will be used for measuring the amount of electric energy consigned to the Company under this contract. The said meters shall be kept under joint seals of the City and Company which shall not be broken except in the presence of authorized representatives of both parties. Either party shall have the right at any time to request an inspection or test, and if found necessary, proper adjustment of such meters in the presence of a representative of the other party appointed for that purpose. When such inspection or test is desired, sufficient notice shall be given by the party desiring the test, to permit of the other party having its representative present. The registration of the meters shall be used as the basis of determining the amount of energy consigned hereunder, unless, upon being tested, the meters shall be found to register inaccurately and such inaccuracy shall exceed two per cent (2%). Where the inaccuracy is more than two per cent (2%), but the actual inaccuracy can be approximately determined, the readings of such meters shall be corrected and such corrected reading shall be used as a basis for determining the amount of energy delivered. Where the registry of the meters cannot be so properly corrected, the amount of energy delivered during such period of inaccurate registry shall be estimated by the engineers for the parties hereto from the average daily plant output of energy during such period, and from any other available and pertinent data.

FOURTEENTH: Technical specifications, details and conditions as to the construction of the interconnecting lines

and switching apparatus at Newark, and as to the maintenance, repair and operation of the power generating plant and transmission system of the City shall be agreed upon by the City Engineer of San Francisco and the Vice President in charge of electrical construction and operation of the Company, and a memorandum of such agreed specifications and operating details shall be filed with and become part of this agreement; provided, that if any changes in said technical specifications or operating details may from time to time become necessary or advisable in the opinion of both of said parties, supplemental memoranda of the same shall be filed, and become part hereof without affecting the remaining terms of the agreement.

FIFTEENTH: The recitals hereinabove contained commencing with the words "Whereas, the City has now completed the construction of the Moccasin Power Plant", and ending with the words "a great loss of potential revenue to the City and its taxpayers; and" are statements made by the City of its purposes and intentions and concerning other matters contained in said recitals. Said recitals are not and no one of them is made by or on behalf of the Company. None of said recitals shall be binding on either of the parties to this agreement in any dispute, controversy or question which may ever hereafter arise in which the same might otherwise be relevant or pertinent.

IN WITNESS WHEREOF, the Board of Public Works has caused these presents to be duly executed and signed by its Members, and the Company has caused these presents to be executed by its officers first thereunto duly author-

ized by resolution of its Board of Directors, a copy of which is hereunto annexed, the day and year first above written.

BOARD OF PUBLIC WORKS OF THE CITY AND COUNTY OF SAN FRANCISCO,
By T. A. Reardon,
By D. G. Fraser,
By C. E. Stanton,
Its Members.

ATTEST:
S. J. Hester,
(Seal) Acting Secretary.

PACIFIC GAS AND ELECTRIC COMPANY,
(a corporation),
By F. A. Leach, Jr.,
Vice President and General Manager.

ATTEST:
D. H. Foote,
(Seal) Secretary.

Contract Provisions in re Consignment.

("Throughout this contract the language of consignment is used"—Opinion of Secretary Ickes, August 24, 1935, R. 247:21.)

"First: The City hereby employs the Company and the Company accepts employment as temporary distributor for and in behalf of the City, of the electric energy to be generated at Moccasin Power House and transmitted to Newark by the City over its own transmission lines. The City agrees . . . to deliver and consign the

entire energy output of its said plant to the Company. . . . The Company agrees to accept such consignment, . . . to transmit so much of said energy through its own system to San Francisco as may be required to light public streets and to meet other municipal needs for electric energy; to supply street railroads, and other consumers of such energy in the City; . . . collect from consumers of such energy the charges therefor . . . and make accounting to the City. . . ."

"Second: The City agrees that the energy consigned to the Company from the Moccasin Plant shall be the entire output thereof. . . ."

"Third: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that of the energy consigned and delivered to the Company at Newark and by the Company delivered to consumers in the City and County of San Francisco there would be transmission, substation and distribution losses amounting to 24 per cent of the energy thus consigned and delivered at Newark and therefore 76 per cent of the energy consigned and delivered at Newark should be taken as the true measure of the amount possible of deliverance to consumers."

"Fourth: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned by the City to the Company at Newark under the

terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that inasmuch as in the year 1924 under existing rates the average revenue received by the Company from consumers in San Francisco amounted to 2.383 cents per kilowatt hour, such average revenue should be applied to 76 per cent of the energy to be consigned and delivered by the City to the Company at Newark for the purposes in this contract declared."

"Fifth: In order to arrive at the amount which should be realized by it for its Moccasin energy consigned and delivered by the City to the Company at Newark under the terms of this agreement for transmission and delivery to consumers, the City has assumed (and the Company for the purposes of this agreement merely, has acquiesced in the assumption) that the City shall receive for the energy consigned and delivered by it to the Company at Newark 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark, and that the Company shall receive 73.065 per cent thereof."

"It is agreed by the City and the Company that the Company shall account for and pay over to the City for the energy so consigned and delivered to it by the City at Newark for transmission and distribution to consumers as provided in this contract 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered by the City to it at Newark, and the Company shall retain the aforementioned 73.065 per

cent as its compensation for services rendered under this contract."

"Seventh: The net proceeds due the City, namely, 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of the energy so consigned and delivered at Newark by it to the Company, shall be paid into the Treasury of the City and County of San Francisco by the Company in monthly installments and not later than the 15th day of each month after operation under this agreement commences. . . ."

"Tenth: It is expressly recognized that this contract is a temporary arrangement between the parties for distributing the energy output of the Moccasin plant over and through the Company's lines and system during the period that must elapse before the City can construct or acquire a distribution system of its own.

It is therefore agreed that the contract may be terminated at any time by either the City or the Company upon one day's previous notice in writing to the other."

"Thirteenth: The Company shall inspect, test and keep in proper repair all meters and accessories at Newark which will be used for measuring the amount of electric energy consigned to the Company under this contract. . . ."

Interpretation of Contracts Civil Code California.

The following nine sections are from Part II, Title III, Civil Code California, on "Interpretation of Contracts", which comprises twenty-seven sections, i.e., 1635 to 1661, inclusive. The title was copied from David Dudley Field's (Proposed) New York Civil Code, 1865, and may be taken to be made up of rules of interpretation of universal acceptance.

Civil Code California.

"1635. All contracts, whether public or private, are to be interpreted by the same rules, except as otherwise provided by this code."

"1636. A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful."

"1638. The language of a contract is to govern its interpretation, if the language is clear and explicit, and does not involve an absurdity."

"1639. When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this title."

"1641. The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

"1643. A contract must receive such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if it can be done without violating the intention of the parties."

"1647. A contract may be explained by reference to the circumstances under which it was made, and the matter to which it relates."

"1650. Particular clauses of a contract are subordinate to its general intent."

"1652. Repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clauses, subordinate to the general intent and purpose of the whole contract."

Proceedings in Congress 1908-1911 Whereunder San Francisco Sought to Obtain Concessions from the Government in Respect of Hetch Hetchy Valley and Other Public Lands; the Five Bills Introduced by Representative Raker in the 63rd Congress, 1st Session, 1913; the Text of Section 6 in each of the Five Bills and Proceedings in respect of and Amendments to Section 6 of the last of the Five Bills which was the one which became the Law.

Proceedings in Congress 1908-1911.

There had been efforts to obtain Congressional concessions from the Government in respect of Hetch Hetchy Valley and other public lands within the period May 16, 1908 and April 25, 1911, but the measure failed of enactment.

The proceedings were in the sessions of Congress below mentioned and in the volumes of the Congressional Record at the pages noted below:

60th Congress, 1st Session, May 16, 1908; 42:6440; 60th C. 2nd S., January 6, 1909, February 1, 1909, February 8, 1909; 43:566, 1662, 2065; 61st C., 1st S., March 19, 1909, March 22, 1909; 44:115, 136, 62nd C., 1st S., April 25, 1911, 47:625.

There was an interregnum of two years until Mr. Raker proposed the legislation which eventuated in The Raker Act.

63rd Congress 1st Session 1913.

Five Hetch Hetchy Bills were introduced by Mr. Raker in the 63rd Congress, 1st Session, and referred to the House Committee on the Public Lands. (The proceedings in respect thereof appear in 50 and 51 Congressional Record.)

The first four were early forms of the grant and the fifth, H.R. 7207, was the bill which with amendments became "The Raker Act," approved December 19, 1913. (38 Stats. 242.)

Section 6 in the Five Bills introduced by Mr. Raker.

Section 6 appeared in all five bills and in the Act as it became a law with varied texts as below.

(1) H.R. 112, introduced April 7, 1913:

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any private corporation or individual, except a municipality, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the city and county, but the rights herein granted to said city and county of San Francisco are for the exclusive use of said city and county and its inhabitants, and for such other municipalities and the inhabitants thereof in the territory surrounding San Francisco Bay, or nearby, in California, as may, with the consent of said city and county, hereafter participate in the enjoyment of the privileges herein granted."

(2) H.R. 4319, introduced April 25, 1913:

"Sec. 6. That the city and county of San Francisco is prohibited from ever selling or letting to any corporation or individual, except a municipality or municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said city and county."

(3) H.R. 6281, introduced June 23, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 4319, except that the word "a" has been inserted in the latter immediately preceding "municipal water district".

(4) H.R. 6914, introduced July 18, 1913:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right for such corporation or individual to sell or sublet the water sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

(5) H.R. 7207, introduced August 1, 1913:

Section 6 in this Act is identical with Section 6 in H. R. 6914, except that the words "or the electric energy" are added in H.R. 7207 immediately following the words "the water".*

*(The words "or the electric energy" were evidently added in Committee to H.R. 6914, for Representative Thomson said September 2, 1913 "When this bill was being considered by the committee I offered an amendment to Section 6, . . . by adding the words 'or electric energy'." (50 Cong. Rec. 4096, c. 2 foot. Following this amendment, Mr. Raker included the words in this, his fifth Bill.)

(6) Proceedings in Respect of and Amendments to Section 6 of the Bill H.R. 7207, which became The Raker Act.

As noted, it was the fifth Bill introduced by Mr. Raker, H.R. 7207, which became The Raker Act.

Section 6 of H.R. 7207, was amended between introduction and enactment and as enacted read as follows:

"Sec. 6. That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee; Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States."

The proceedings in the House in respect of H.R. 7207 here follow—The Bill was introduced August 1, 1913.

On August 5, 1913, it was reported favorably by the House Committee on the Public Lands, without amendment, and referred to the Committee of the Whole.

The bill was discussed on various days subsequent to August 5, 1913 and up to September 3, 1913, when it passed the House.

On August 29, 1913, Mr. Raker explained the occasion for his several bills and that he had introduced H.R. 7207 on August 1, 1913, to embody all of the conclusions which had been reached in the House Committee on the Public Lands (50 Cong. Rec. p. 3900, c. 1 foot) up to that day.

Two amendments to Section 6 were agreed to on August 30, 1913, (a) one striking out the proviso at the end of

Section 6 and substituting therefor the proviso found in the enacted bill (50 Cong. Rec. p. 3998, c. 2 foot);* and (b) one striking out the words "for such corporation or individual" immediately preceding the words "to sell or sublet."** (50 Cong. Rec. p. 3999, c. 2 middle.)

Provisions of The Raker Act Imposing Obligations Upon the Municipality in the Nature of a Price Paid for the Grant.

Among the provisions in the Act which are referable, wholly or in part, to the price paid by the Municipality to the Government are the provisions following providing that it shall.

1. "pay to the United States the full value of all timber and wood cut, injured or destroyed on or adjacent to any of the rights of way and lands" (Sec. 4; R. 17:31-18:3).

---

*The proviso attached to Section 6 in H.R. 6914 and H.R. 7207, supra, read as follows:

"Provided, That the rights hereby granted shall not be subject to sale, assignment, or transfer to any private person, corporation, or association."

The substitute agreed to on August 30, 1913, which appears in the Act as enacted, reads as follows:

"Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer or convey, this grant shall revert to the Government of the United States."

**The words "for such corporation or individual" thus stricken from Section 6 of the Hetch Hetchy grant appear in President Theodore Roosevelt's Dictation of June 25, 1906 and in The Owens River Grant enacted June 30, 1906, and in the five Hetch Hetchy Bills introduced in the House, 63rd Congress, 1st Session, 1913 by Mr. Raker, i.e., H.R. 112, 4319, 6281, 6914 and 7207; but were stricken from Section 6 of the then Bill (7207) on motion of Representative Murray of Oklahoma on August 30, 1913 (50 Cong. Rec. 3999). The change was agreed to by Mr. Raker, who said that the section meant the same whether the words remained or were stricken.

2. "permit any road or trail which it may construct . . . to be freely used by the officials of the Government and by the public" (Sec. 4; R. 19:1-5)

3. "permit officials of the Government, for official business only, the free use of any telephone or telegraph lines, or equipment, or railroads that it may construct and maintain . . . together with the right to connect with any such telephone or telegraph lines private telephone wires for the exclusive use of said Government officials" (Sec. 4, R. 19:6-14)

4. "assign, free of cost to the United States, all roads and trails built" (Sec. 7, R. 21:15-16).

5. Commencing with December 19, 1918 (five years after the passage of the Act) to pay the United States $15,000 annually for ten years; $20,000 annually for the next ten years; and $30,000 annually for the remainder of the term unless altered by Congress (Sec. 7, R. 21: 17-27)

6. construct specified scenic roads or trails and a wagon road and "such roads and trails [as are] made necessary by this grant, and as may be prescribed by the Secretary of the Interior"; lay and maintain a water pipe or otherwise provide for camp purposes at a specified point (Section 9 (p), R. 32:20-33:21)

7. "furnish water at cost to any authorized occupant within one mile of the reservoir" (Section 9 (q), R. 33:28-30)

8. "reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed" (Section 9 (q), R. 33:31-34:3)

9. bear the expense of all investigations and decisions in respect of the subject of the grant incurred by the Department of the Interior (Section 9 (r); R. 34:4-10)

10. convey to the United States "any and all tracts of land which are now owned by said grantee within the Yosemite National Park or that part of the national forest adjacent thereto not actually required for use under the provisions of this Act". (Section 9 (t); R. 34:15-22)

11. furnish water to the military reservations in or near San Francisco at "the actual cost of said water to said City and County for all the water so furnished" (Section 9 (u), R. 34:28-35:11).

The Provisions of The Raker Act Involving Forfeiture or Reverter, and the "Condition" or "Conditions" Thereof, none of which involve Forfeiture or Reverter, but the Enforcement of which is provided for in Section 9, subsection (u).

Section 5 in terms provides for a forfeiture and Section 6 for a reverter. Forfeiture was provided in Section 5 in each of the five Hetch Hetchy Bills introduced by Mr. Raker in the 63rd Congress, 1st Session, in 1913.

The proviso in Section 6 carrying the reverter clause did not appear in any one of the five Bills as introduced by Mr. Raker, but was added by an amendment to the last of them on August 30, 1913.

Section 11, containing the word "conditions", mentioned only because in point of number it was later than Section 9, subsection (u), appeared in the fourth and fifth Bills introduced by Mr. Raker, H.R. 6914, July 18, 1913, and H.R. 7207, August 1, 1913.

Section 9, subsection (u), never appeared in any of the Bills, but was added September 2, 1913, the day immediately preceding the passage of the Act in the House, which was September 3, 1913. (R. 72 ft., 75 ft.) The proceedings in the House which led to the inclusion of Section 9, subsection (u), are shown in the Answer of the Municipality filed in the District Court. (See R. 70-75.)

Thus we see that in point of enactment, Section 9, subsection (u) was last, and that provision, as will be seen (R. 70-75) was to wipe out all possibilities of forfeiture except, say, for the reasons covered by Section 6 and the provisions of Section 6.

We now quote the above mentioned provisions of Section 5, Section 6, Section 9, subsection (u), and every other provision in the Raker Act wherein the word "condition" or "conditions" appears. (These words appear once in Section 1, eleven times in Section 9, and once in Section 11.)

(1) Sec. 1. "under such conditions and regulations as may be fixed by the Secretary of the Interior and the Secretary of Agriculture" (R. 14:26-29)

(2) Sec. 5. "That the construction of the aforesaid works shall be prosecuted diligently, and no cessation of such construction shall continue for a period of three consecutive years, and in the event that the Secretary of the Interior shall find and determine that there has not been diligent prosecution of the work or of some integral and essential part thereof, or that there has been a cessation of such construction for a period of three consecutive years, then he may declare forfeited all rights of the grantee herein as to that part of the

works not constructed, and request the Attorney General, on behalf of the United States, to commence suit in the United States District Court for the Northern District of California for the purpose of procuring a judgment declaring all such rights to that part of the works not constructed to be forfeited to the United States, and upon such request it shall be the duty of the said Attorney General to cause to be commenced and prosecuted to a final judgment such suit" (R. 19:26-20:16)

(3) Sec. 6. ". . . Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States" (R. 21:6-12)

(4) Sec. 9. "That this grant is made to the said grantee subject to the observance on the part of the grantee of all the conditions hereinbefore and hereinafter enumerated:" (R. 22:16-19)

(5) Sec. 9, sub-sec. (a), subd. Fourth. "The cost of the inspection necessary to secure compliance with the sanitary regulations made a part of these conditions, which inspection shall be under the direction of the Secretary of the Interior, shall be defrayed by the said grantee" (R. 23:17-21)

(6) Sec. 9, sub-sec. (d). "upon the express condition, however, that the said grantee may require the said irrigation districts to purchase and pay for a minimum quantity of such stored water" (R. 25:30-26:2)

(7) Sec. 9, sub-sec. (1). "no power plant shall be interposed on the line of the conduit except by the said

grantee, or the lessee, as hereinafter provided, and for the purposes and within the limitations in the conditions set forth herein" (R. 29:15-19)

(8) Sec. 9, sub-sec. (m). "That the right of said grantee in the Tuolumne water supply to develop electric power for either municipal or commercial use is to be made conditional for twenty years" (R. 29:26-29)

(9) Sec. 9, sub-sec. (n). "and in case of the failure of the grantee to carry out any such requirements of the Secretary of the Interior the latter is hereby authorized so to do, and he may, in such manner and form and upon such terms and conditions as he may determine, provide for the development" etc. (R. 31:18-23)

(10) Sec. 9, sub-sec. (p). "That this grant is upon the further condition that the grantee shall construct on the north side of the Hetch Hetchy Reservoir site a scenic road or trail, as the Secretary of the Interior may determine" (R. 32:20-24)

(11) Sec. 9, sub-sec. (q). ". . . it shall reimburse the United States Government for the actual cost of maintenance of the above roads and trails in a condition of repair as good as when constructed" (R. 33:31-34:3)

(12) Sec. 9, sub-sec. (r). "That in case the Department of the Interior is called upon, by reason of any of the above conditions, to make investigations . . . which . . . involve expense . . . then such expense shall be borne by said grantee" (R. 34:4-10)

(13) Sec. 9, sub-sec. (s). "That the grantee shall file . . . its acceptance of the terms and conditions of this grant" (R. 34:11-14)

(14) Sec. 9, sub-sec. (u). . . . "Provided, however, That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act" (R. 35:15-25)

(15) Sec. 11. "That this Act is a grant upon certain express conditions specifically set forth herein, and nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the State of California relating to the control, appropriation, use, or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with the laws of said State" (R. 36:1-11)

Proceedings in Congress to show that the Raker Act was not designed to grant water rights and that the necessary rights were already possessed by the Municipality.

Representative Raker, August 29, 1913:

"The bill is not drafted nor designed nor intended to usurp the powers of the State of California in the matter of control of the distribution of water." (50 Cong. Rec. p. 3900, c. 1 middle.)

Representative Ferris of Oklahoma, September 2, 1913:

"We, of course, must not invade the State laws where parties have prescribed water rights." (50 Cong. Rec. p. 4096, c. 1 ft.)

Senator Borah of Idaho, October 4, 1913:

"The Government is not undertaking to regulate and cannot control the waters of the State of California." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Pittman of Nevada, October 7, 1913:

". . . this bill does not grant any water rights to anyone; it does not take away any water rights from anyone;" (50 Cong. Rec. 5494, c. 1 ft.)

Senator Smoot of Utah, December 1, 1913:

". . . the only way in which San Francisco can have her needs supplied is under the laws of California. San Francisco can make appropriations of the water, and I understand she has already done so. If she has made these appropriations, all that prevents her from going on with the project is that she must have an act of Congress authorizing her to construct a pipe line over the public domain and build a reservoir. . . . That will give her all the rights Congress can give her. It will give her a right of way to enable her to use every drop of water to which she is entitled. She is not entitled to a gallon of water she has not appropriated under the laws of California, no matter how many bills we pass in Congress purporting to grant her more." (51 Cong. Rec. p. 13, c. 1 middle.)

Senator Thomas of Colorado, December 3, 1913:

". . . the city of San Francisco is not attempting, and and could not if it would attempt, to secure a grant

from the Government of the United States of any water power whatever." (51 Cong. Rec. p. 132, c. 1 ft.)

Senator Lippitt of Rhode Island, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Smoot of Utah, December 3, 1913:

"The Government of the United States does not own any water." (51 Cong. Rec. p. 136, c. 1 middle.)

Proceedings in Congress to show that the Raker Act was a grant by a proprietor and not by a Sovereign.

Representative Raker, August 29, 1913:

"The theory on which this bill is drawn is that the United States, having sole jurisdiction over the national park, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantee." (50 Cong. Rec. p. 3900, c. 1 middle.)

Secretary Lane, August 29, 1913 (testimony given by him at an earlier hearing but laid before the House on the day just stated):

"The general principle of the bill is that these lands belong to the Federal Government and that we have control of them. The water originates in them, the water flows through them, and we have control over the dam site, and if we are to allow these lands to be submerged we have got the right to make certain conditions. Certainly no one can come in and use

lands in a national park without our consent, and if you give consent you have got the right to make conditions." (50 Cong. Rec. p. 3907, c. 1 middle.)

Representative French of Idaho, August 30, 1913:

"As has been stated in the report of the Committee on the Public Lands, the theory on which this bill is drawn is that the United States, having the sole jurisdiction over the Yosemite National Park, the Stanislaus National Forest, and the public lands that would be involved in the grant, has the right to refuse the grant and also has the right in making the grant to impose certain conditions upon the grantees." (50 Cong. Rec. p. 3967, c. 1 middle.)

Representative Thomson of Illinois, August 30, 1913:

"This is not so much a legislative act or grant as it is a contract between the Government and San Francisco and these other cities, in which we, representing the Government, not only may but should place proper and reasonable conditions. That Congress has the right to impose such conditions there can be no question." (50 Cong. Rec. p. 3979, c. 1 foot.)

Representative Mann of Illinois, September 2, 1913:

"It is a principle of law that Congress in granting a right can grant it on conditions and provide for its ending as it pleases, regardless of courts." (50 Cong. Rec. p. 4104, c. 2 middle.)

Representative Mondell of Wyoming, September 2, 1913:

"I do not claim that the Federal Government may not fix conditions on a grant of a right of way. . . . It might make a condition as to a grant of right of way over which water is to be carried that the city shall not charge over a certain amount for the water fur-

nished to its citizens. That is a condition that I should not consider necessary or proper, but it does not impair a constitutional right. What I claim is that Congress has no power to shorten the sovereignty of a State. . . . In the bill are a lot of provisions they think may be enforced, contrary to that rule, through the medium of a contract. I do not think it is good legislation." (50 Cong. Rec. p. 4111, c. 1, middle.)

Senator Borah of Idaho, October 4, 1913:

"The Government . . . is simply attaching a condition to a specific grant which it is making to the city of San Francisco, as a proprietor and not as a sovereign." (50 Cong. Rec. p. 5472, c. 2 ft.)

Senator Lippitt of Rhode Island, December 3, 1913:

"As I understand the way the act is drawn, the United States gives a right of way to the city of San Francisco and that is substantially all it gives. And the dam site." (51 Cong. Rec. p. 135, c. 2 middle.)

Senator Brandegee of Connecticut, December 4, 1913:

". . . if the Government is the proprietor of land I have no doubt whatever of the power of the Government to sell its land or to grant any less estate than a fee simple under whatever conditions it may attach, which are, in my opinion, the same as those which any other proprietor of land may attach." (51 Cong. Rec. p. 183, c. 1 top.)

Senator Borah of Idaho, December 5, 1913:

"I have no doubt of the power of the National Government to attach such conditions to this grant as any other proprietor may attach to a grant of land,

and I have no doubt of the proposition that the Government can attach no other conditions than an individual proprietor of land could attach to a grant of land; in other words, the National Government cannot, in making a grant of this kind, combine its proprietary rights with its sovereign power and do things as a proprietor because it is a Government that it could not do as a proprietor if it were not a Government." (51 Cong. Rec. p. 286, c. 2 middle.)

California Constitutional Provisions Respecting Franchises.

Article XIV, Section 1 of the California Constitution of 1879 provides:

"The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law; provided, that the rates or compensation to be collected by any person, company, or corporation in this state for the use of water supplied etc. [here provision is made for the annual fixing of rates by the governing legislative bodies of municipalities, a power since then transferred to the Railroad Commission]. . . . Any person, company, or corporation collecting water rates in any city and county, or city, or town in this state, otherwise than as so established, shall forfeit the franchises and waterworks of such person, company, or corporation to the city and county, or city, or town, where the same are collected, for the public use."

The provision which gave rise to the so-called "constitutional franchises" is Article XI, Section 19 of the California Constitution of 1879, amended in 1911. (See *Russell v. Sebastian*, 233 U.S. 195.)

Both texts follow.

In force from 1879 to 1911, Art. XI, s. 19, Constitution:

"§19. In any city where there are no public works owned and controlled by the municipality for supplying the same with water or artificial light, any individual, or any company duly incorporated for such purpose, under and by authority of the laws of this state, shall, under the direction of the superintendent of streets, or other officer in control thereof, and under such general regulations as the municipality may prescribe, for damages and indemnity for damages, have the privilege of using the public streets and thoroughfares thereof, and of laying down pipes and conduits therein, and connections therewith, so far as may be necessary for introducing into and supplying such city and its inhabitants either with gaslight, or other illuminating light, or with fresh water for domestic and all other purposes, upon the condition that the municipal government shall have the right to regulate the charges thereof."

In force since 1911, Art. XI, s. 19, Constitution:

"§19. Any municipal corporation may establish and operate public works for supplying its inhabitants with light, water, power, heat, transportation, telephone service or other means of communication. Such works may be acquired by original construction or by the purchase of existing works, including their franchises, or both. Persons or corporations may establish and operate works for supplying the inhabitants with such services upon such conditions and under such regulations as the municipality may prescribe under its organic law, on condition that the municipal government shall have the right to regulate the charges thereof. A municipal corporation

may furnish such services to inhabitants outside its boundaries; provided, that it shall not furnish any service to the inhabitants of any other municipality owning or operating works supplying the same service to such inhabitants, without the consent of such other municipality, expressed by ordinance. [Amendment adopted October 10, 1911.]"

Opinion of Acting Solicitor Wright of the Interior Department, dated July 20, 1925, holding contract of July 1, 1925, one of agency and not one of sale. (R. 359-366.)

(This Opinion, first made public in the Opinion of Secretary Ickes of August 24, 1935 (R. 234:31-235:8) was received in evidence subject to a motion to strike and later stricken out (Assignment of Error No. 11, R. 535).)

"Department of the Interior
Washington

Address only
Secretary of the Interior

July 20, 1925

The Honorable,
The Secretary of the Interior.
My dear Mr. Secretary:

There is before me, by reference from you, a certain contract executed on July 1, 1925, by duly authorized members of the Board of Public Works of the City and County of San Francisco, on the one part, and by the Pacific Gas and Electric Company, a corporation acting through its Vice-President and General Manager, thereunto duly authorized, on the other part. The contract, full copy of which is hereto attached, purports to provide for the utilization of certain electric energy owned by the party of the first part through the plant and equipment of the *part* of the second part, as a temporary expedient, the occasion being the existence of a large

amount of power owned by the City and County but not now available for consumption for the reason that the City and County own no distribution system of their own. The recitals in the contract quite fully explain the occasion, the purpose, and the methods of the plan for its immediate utilization.

I am asked whether this contract is a contract of sale. The question requires determination because section 6 of the Raker Act (Act of Decem. 19, 1913, 38 Stat., 242), under which the City and County of San Francisco acquired a franchise to develop and has developed this power, provides:

> That the grantee is prohibited from ever selling or letting to any corporation or individual, except a municipality or a municipal water district or irrigation district, the right to sell or sublet the water or the electric energy sold or given to it or him by the said grantee: Provided, That the rights hereby granted shall not be sold, assigned, or transferred to any private person, corporation, or association, and in case of any attempt to so sell, assign, transfer, or convey, this grant shall revert to the Government of the United States.

Assuming that the proviso refers to the franchise in its entirety ('rights hereby granted', i. e., by the Act), and eliminating language not pertinent to the matter immediately to be considered, section 6 comes to this:

> That the grantee is prohibited from ever selling or letting to any corporation * * * * the right to sell or sub-let * * * * the electric energy sold or given to it * * * * by the said grantee.

This is a prohibition, the breach of which might be considered as a failure to observe one of the conditions specified in the Raker Act. And the proviso

to paragraph 'u' of Section 9 of the Act reads as follows:

> That the grantee shall at all times comply with and observe on its part all the conditions specified in this Act, and in the event that the same are not reasonably complied with and carried out by the grantee, upon written request of the Secretary of the Interior, it is made the duty of the Attorney General in the name of the United States to commence all necessary suits or proceedings, in the proper court having jurisdiction thereof, for the purpose of enforcing and carrying out the provisions of this Act.

The City having completed the Moccasin power plant as a part of the development of the Hetch Hetchy project, it now can deliver electric energy to the extent of 420,000,000 kilowatt hours to a point near Newark; but Newark is several miles from the City of San Francisco. The City owns no transmission line from Newark to the City. Nor does it own any distribution system in the City. The Pacific Gas and Electric Company owns both a transmission line and a distribution system. The City has started proceedings looking to the ultimate acquisition of this system. It has at present no funds with which to purchase or to build a system of its own. Consequently, there will be a great waste of electric energy and a great loss of potential revenue therefrom to the City and to taxpayers unless some plan within the power of the grantee under its franchise, the Raker Act, is devised for its present utilization. At least two years will elapse before the City, under favorable conditions, can be the owner of a distributing system capable of marketing the power which it owns. In this situation, the contract recites, the City 'employs' the Company as

its temporary distributor. The City agrees to produce, deliver, and consign all its energy output (save any such portion as may be reserved for certain city requirements). The Company agrees to take the entire energy output, to connect the City's transmission line with its own at Newark, installing all necessary equipment and meters for measurement, to transmit to San Francisco through its own system so much of the same as may be required to light the streets and to meet other municipal requirements and to supply street railroads and other consumers, to furnish all necessary peak load and steam standby service, to collect for consumers the charges which shall not exceed lawfully established rates, and to make due accounting to the City. The contract provides for the exclusion of such portion of energy as the City may be required to furnish to irrigation districts or municipalities under the terms of the Raker Act. It is agreed that the transmission and distribution losses will amount to 24 per cent of the energy consigned to the Company at Newark. To arrive at the amount of compensation which the Company should receive for its service and the amount that the City should realize from the power so developed, transmitted, and consumed, the average revenue received by the Company from consumers in San Francisco in 1924 is taken as the basis: 2.383 cents per kilowatt hour. This rate is to be applied to 76 per cent of Newark energy. The Company is to collect from consumers and is to account for and pay over to the City 26.935 per cent of 2.383 cents per kilowatt hour for 76 per cent of energy consigned and delivered to it at Newark. The difference, i. e., 73.065 per cent x 2.383 cents x 76 per cent of Newark energy is to be retained by the Company as its compensation for services under the con-

tract. On this basis the City will receive something in excess of $2,000,000 annually. The contract recites that it is a temporary arrangement between the parties for the distribution of this electric energy to cover the period that must elapse before the City is in a position to attend directly to the distribution of its product. It may be terminated at any time by either party on one day's notice. The contract, of course, covers other points, none of which, however, bears materially upon its fundamental nature; and it is with that that I am concerned.

I am unable to say that this contract effects a sale of the energy to the Company. It certainly does not so appear on its face. It is rather to be described as a contract of agency. It does not import a transfer of the property in the electric energy to the Company for a price in money. From its terms alone, I can not reach the conclusion that the Company acquires an absolute title to the power it takes over and distributes. To be sure, possession will pass to the Company, but that would be true of an agency. A sale includes not only the idea of divesting a seller of title but of vesting such title in the buyer. I can not deduce that as a fact or an intention from the sole evidence of the transaction now before me, the contract. Time alone will develop other evidential factors which may yield a certainty in conviction on that point: e. g., the manner in which the Company deals with the consumer. Will it bill the product sold in the name of the City, or in its own name as agent of the City, or in its own name as though it were the owner? These elements, factors of decision, are not present; and there are other things, incident to management

or operation, which might have a bearing. They are not now present, I must take the contract as it is.

The contract certainly provides for the delivery by the City to the Company of its property, this energy. The Company takes the consignment which is to be sold to the consumer. It appears to be much like a consignment to a commission merchant. The liability of the Company is estimated on expected proceeds; at least, it is to account on a basis that contemplates the sale of the entire product to consumers. There might be room for some argument on this point inasmuch as the amounts to be divided between the City and the Company are computed on the amount delivered and consigned, with due allowance for customary loss. But when it is considered that *all* said energy will be used, consumed, and paid for by the ultimate purchaser, this provision in the contract loses much of its significance as pointing to a sale. It is fundamental that to constitute a sale there must be a transfer of title. If, under this contract, the Company acquires a title to the energy the minute it receives the same at Newark, then it would have the rights of ownership and could dispose of it as it pleased. I do not think it can be said from the evidence that the terms of the contract afford that this is so. I am constrained to the conclusion, judging the matter by the only factors now in being—i. e., the conditions and the terms of the agreement—that this is not a contract of sale or lease, but rather one of agency, and that no evidence of a violation of the inhibitions of section 6 of the Raker Act is presented by this contract; and I so advise you.

Respectfully yours,

C. EDWARD WRIGHT

Acting Solicitor."